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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-96

DANIEL E. DAMON, Superintendent of Elmira Reformatory,

Petitioner,

against

SHELDON LEESON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF AND BRIEF IN OPPOSITION TO RESPONDENT'S CROSS PETITION FOR CERTIORARI

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Respondent's sole claim throughout these proceedings has been that his guilty plea was entered on a misunderstanding as to the maximum possible sentence he could receive because of the alleged failure of his trial attorney to inform him that he could alternatively be sentenced to a five year reformatory term because of his age. It is undisputed that neither the prosecutor nor the trial court made any representations which were not met. Under these circumstances, the Circuit Court should have assessed the validity of respondent's plea in terms of the overall adequacy of his counsel's representation and not pursuant to the more restrictive standard set forth in *Kercheval* v.

United States, 274 U.S. 220 (1927), reserved for those cases where the prosecutor or trial court has misled a defendant.

At bar, the State of New York had a very strong case against the respondent. The respondent had admitted his participation in the larceny of Hayden Stone, Inc., to the officers of the Company and additionally, his codefendant, Samuel Carville, had implicated him. Respondent has never alleged that he had any defenses to the charges against him, his attorney's advice to plead guilty was sound, and his allegations that his attorney failed to inform him of an alternative sentencing provision is insufficient to invalidate his plea.

Respondent argues that the Circuit Court properly relied on *Kercheval* v. *United States, supra* and held that respondent's plea was not knowingly and intelligently entered, relying on cases cited by the majority opinion (Pet. Appendix pp. 23-24). However, these cases fail to support the Circuit Court's holding since they (1) illustrate shocking and aggravated cases of inadequate or no legal representation, *Wade* v. *Wainwright,* 420 F. 2d 898 (5th Cir. 1969) (defendant, apparent novice to the criminal courts, subjected to ten instead of two years imprisonment); (2) are discretionary determinations by the federal courts to vacate pleas pursuant to Rule 11 of the Federal Rules of Criminal Procedure, *Matthews* v. *U.S.,* 308 F. Supp. 456 (S.D.N.Y. 1969); *McCullough* v. *U.S.,* 308 F. Supp. 741 (N.D. Fla. 1964), *Kotz* v. *U.S.,* 353 F. 2d 312 (8th Cir. 1965), *Wells* v. *U.S.,* 452 F. 2d 1001 (5th Cir. 1971); or (3) are cases where the court or prosecutor made a sentence representation, *Marvel* v. *U.S.,* 380 U.S. 262 (1965).

In short, in none of these cases did the Courts adopt the blanket rule adopted by the Second Circuit at bar which, in effect, invalidates a guilty plea simply because

defense counsel made an erroneous assessment, notwithstanding that the record as a whole supports the conclusion that counsel's overall representation was in all respects adequate. (see opinion of HAYS, J. dissenting).

Respondent, in support of his cross petition for certiorari, argues that the Circuit Court should have vacated his conviction instead of remanding him to the District Court for a fashioning of a remedy.

However, as petitioner has set forth in his petition, respondent was a state prisoner attacking a state conviction and the State Court is the proper forum for determining the relief to be accorded him. Unlike the defendants in *Bentley* v. *Florida*, 285 F. Supp. 494 (S D Fla. 1968); *People* v. *Kvalheim*, 17 N Y 2d 510 (1966); *People* v. *Scala*, 26 N Y 2d 753 (1970) and *People* v. *Witenski*, 15 N Y 2d 392 (1965), relied upon by respondent here, respondent does not deny the overall effectiveness of his attorney's representation, but merely attacks the sentence he received. Moreover, in none of these cited cases did the defendant plead to a reduced charge of the indictment as did respondent here. Although respondent at bar has served five years, if convicted on the original indictment for Forgery and Grand Larceny in the First Degree, he faces a twenty-year prison term and as the Circuit Court observed upon reargument (Respondent's Exhibit A), the five years would be available as a credit on this twenty-year term. In any event, insofar as respondent argues that the plea should be vacated, he relies principally upon New York law, supporting petitioner's argument that respondent should be remanded to the New York Courts for the fashioning of relief.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and respondent's cross petition for certiorari should be denied.

Dated: New York, New York, October 4, 1974.

Respectfully submitted,

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